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UNITED STATES SUPREME COURT

OCTOBER TERM, 1984

THOMAS G. HETZEL,

Petitioner

vs.

BOARD OF PROFESSIONAL RESPONSIBILITY
OF WISCONSIN,

Respondent.

ON WRIT OF CERTIORARI FROM
THE WISCONSIN SUPREME COURT

REPLY BRIEF

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WHETHER THERE IS AN IMPORTANT FEDERAL QUESTION AND WHETHER THE CRITERIA OF RULE 17 IS MET?

Counsel for respondent argues the this Court should not take jurisdiction because an important federal question is lacking.

As a trial attorney, it has always been my position on behalf of any client that a deprivation of a fundamental constitutional right was an important matter. I know of no case which tolerates as acceptable an abuse because one person is involved. As a trial attorney, the number though small in comparison to all attorneys, is of sufficient magnitude to make the federal question of whether a state supreme court can ignore the practioner's constitutional rights because he practices law?

The foundation of our present legal system for the people begins at the office of the practioner who is in the private practice of law.

If the problem is one calling for an adversary proceeding, it is hoped that the client is lucky enough to knock on the door of a trial attorney. There is no decision rendered or "new law made" unless a trial attorney is willing to take the case. Club the trial attorney into submission and the present framework of our legal system ceases entirely. Even now there are too many attorneys who skim the cream and who will not go to trial unless he has a "sure thing". If this case is allowed to stand, the clones rise and the individualism of the trial attorney ceases. For example in the Ed and Vera Peters case, it dealt with my attempt to help the mobile home owners organize and not be terminated from there plots without just cause. I probably donated $5-10,000.00 of my time. I do not need to be insulted by some smart-aleck from BAPR thinking up questions so time-consuming to answer that I would have to shut my practice down. My position still is that the arbitrary

questions will be answered upon payment of my time. BAPR was aware that no money was missing. The name of the mobile home case is SCALZO v. ANDERSON, et al., 87 Wis. 2d 834, 275 NW 2d 894 (1979) My offense was not answering BAPR's arbitrary and unreasonable questions unless paid for my time.

Petioner, having been victimized by Wisconsin's system, believes that the judiciary has taken the position that the practioner practices at its whim. Licensed to practice law in Wisconsin equates to second class citizenship - no rights. Having set forth the events in petitioner's innitial brief, it is hard to visualize how the state supreme court even gives lip service to the United States Constitution when it involves itself with a practioner of law.

When the Wisconsin Supreme Court set up the integrated bar and decreed that the practice of law must join, it was stated that the

practioner was to retain his independence: "
"The integrated bar does not destroy either the independence of the bar or of the individual lawyer." IN RE INTEGRATION OF BAR (1958) 5 Wis. 2d 618, 623, 93 NW 2d 601. Having participated in the tangled morass of this proceeding and received the benefit of the laws the state supreme court legislated, adjudicated, and prosecuted, petioner understands well that the word "independence" is not synonomous with fundamental constitutional rights as viewed by the Wisconsin Supreme Court. If one state supreme court will not accord the practioner his constitutional rights is there more? How long does this situation have to exist before the United States Supreme Court would recognize this situation as an important federal question. Petioner contends that this entire federal question stems from COHEN v. HURLEY, (1961) 366 U.S. 117, 81 S.Ct. 954, 6 L.Ed. 2d 156 as a natural by-product. (see the dissent). Of

course if the trial attorney is to be the judiciary's vassel in America, then the questions presented has as much "worth" as any vassel's contentions ever have had.

Respondent's counsel states that the EX POST FACTO doctrine applies to legislation only. Petioner was unable to find any Wisconsin Statute passed by the legislature authorizing the Wisconsin Supreme Court to be the body to discipline the practioner or to enact its legislation which it calls Supreme Court Rules (SCR). Yet SCR chapters 10-99 enact and set up the State Bar, the attorney, his ethics, BAPR, and the disciplinary procedure. The Wisconsin Supreme Court set itself up as the legislature in this area. SUPREME COURT OF VIRGINIA v. CONSUMERS UNION OF THE UNITED STATES, INC. (1980) 446 US 719, 64 L Ed 2d 641, 100 S Ct 1967 recognizes that the judiciary can be legislative (pass laws). It should follow that judicial legislation is subject to the EX POST FACTO

doctrine of the United States Constitution. In this action the Wisconsin Supreme Court wears all three hats, to wit; legislative, judicial, and prosecutorial (executive). Lacking is the usual checks and balances found when there is a separation of powers.

In reading the criteria of Rule 17, respondent's counsel is correct that the case does not seem to meet the criteria squarely on all points. Subsection 1c of said rule comes closest in that the State Supreme Court has decided that trial attorneys have no federal constitutional rights. COHEN v. HURLEY, supra, met the criteria and my case is a natural by-product of the COHEN CASE. Perhaps, when Rule 17 was written no one forsaw that a state supreme court would completely ignore the United States Constitution and the United States Supreme Court's decisions that interpret it.

Respondent's counsel does not see how the change from a de novo review by the state sup-

reme court to accepting the referee's findings had any substantial impact on petitioner's case. The briefs of petioner were directed towards the making of accurate findings of facts by the Wisconsin Supreme Court to include the finding of facts which the referee did not make. Without knowing what the ultimate findings of facts are to be, it is hard to submit a precise brief on the law. Likewise if the findings of facts included our proposed facts which were unequivacably established by the evidence, many of the counts would fall. It should be noted that my counsel and I believe the counts would fall based upon the actuality of the practice of law. Had the petioner been aware of the change, a motion to reconsider would have been presented to the referee so that the findings of facts that petitioner sought would have been made or the error preserved. As it was the referee made findings contrary to both side's position as to what the facts were. (pet. brief pg. 20)

The only area where the change had no effect is where the Wisconsin Supreme Court assessed petitioner $18,532.80 in costs. The referee made no findings as to costs and the State court entered its own. BAPR had been unsucessful in half of the counts charged before the referee. As an aside, should a judge have success in his disciplinary proceedings, his attorney fees are reimbursed.

Respondent questions how the order which removes petitioner's license has anything to do with the following areas: obligation of contract; violation of the commerce clause; deprivation of property without just compensation; denial of petitioner's right to the effective assistance of counsel and denied him equal protection of the law. It is obvious that respondent's counsel has not been engaged in the private practice of law. Nor has theory and the reality of practice been melded togeth' er in this action either.

In the Karen Franklin case, petitioner had a contract with a third-party to pay said Franklin's fees. According to the state supreme court petitioner's refusal to pay restitution for his client out of the third-party's funds is a violation of the ethical code in that petitioner is sacrificing his client's interest for financial gain. Obviously respondent's counsel receives a guaranteed salary without having to expend a penney for rent, secretary, library, etc. The ability of the state court to take away my license to practice certainly impairs my ability to contract with a client or a friend of the client willing to pay fees. Here the assistant district attorney unilaterly goes after my fee (livlihood) for the purpose of restitution. I am supposed to like it or lose my licesence to practice law. At the present time I am unaware of any other profession or non-professional person subjected to this form of contract impairment.

As to how the decision of the state supreme court violates the commerce clause is seen in the Dibble case. The court's decision was in. Ellen Dibble came to petitioner's office of her own violation. She was told she could take the agreement to any attorney she wanted. That night she even had additional terms inserted in the agreement. In Kenosha, Illinois clients often seek Wisconsin counsel and Kenosha clients often seek advice from Kenosha attorneys on Illinois problems. While there is at least 120 attorneys practicing, there probably are not 12 decent trial attorneys. By holding client's to an attorney until there is a signed judgment, the free movement of the consumer is prevented. Likewise if the litigants want to try to reconcile their differences and use one attorney the attempt is prevented and hindered.

As to petitioner's being deprived of property without just compensation, the actions of Karen Lingle, assistant district attorney,

would have done just that when she demanded that the money of a third-party assigned to petitioner to pay for Karen Franklin's legal fees be used for restitution. Petitioner has already expended his time, paid his expenses so that Karen Franklin received the assistance of counsel of her choice. The state supreme court in taking my license is approving the actions of the assistant district attorney when she attempted to deprive me of my property without just compensation. The state court is guilty of aiding and abetting the deprivation of my constitutional rights.

As to a denial of effective assistance of counsel for me, no such claim has ever been made. Respondent's counsel is obviously unaware that in criminal cases, a criminal client is entitled to the effective assistance of counsel and if counsel is ineffective a new trial can occur. The Joe Johnson situation seems to have given BAPR a hard time because at one point

BAPR WAS ACCUSING ME OF WRONGDOING because it believed the attorney for the State of Wisconsin in a criminal case represented the victim and I could not approach the victim-witness without the district attorney's permission. This is not Wisconsin law and BAPR was set straight in this area. (The reason the above is set forth is because I wonder if the people setting the rules and administering the rules really understand the private practice of law. I have been involved in everything but patent and maritime law.) IN the Joe Johnson case, the assistant district attorney indicated to petitioner that the D.A.'s office would be willing to dismiss if the "victim" was so inclined. As you are all aware, the D.A. does not go out and affirmatively tell the victim this. Now the question is do I, the defense counsel have the responsibility to make this known to the victim so I qualify as effective assistance of counsel? I believe I do. Better yet, I know that if I hired a lawyer who was

given this information, I would want my attorney to say something to the "victim". I made my decision. Prior to my decision, there is no guideline deliniating for the practioner what the effective assistance of counsel means. You check the SCR put out by the Wisconsin Supreme Court and it does not tell you either. There is nothing unusual about the above situation. (for trial attorneys) The water is always choppy and murky and we make the best decision we can while under fire. The private practice of law involves the trial attorney in all sorts of situations. People do all kinds of things. Thus, decisions are made to handle a wide variety of circumstances in which the beauarcracy lacks visual perception as it spews forth its rules.

As to how petitioner is deprived of the equal protection of the law by these proceedings occurs as follows. In the Joe Johnson case I am convicted of two counts of which

the state supreme court and the referee forgot to give me a written complaint and give me a chance to defend myself before they "hung me". I realize that when one is the legislature, adjudicator of one's law, and the prosecutor that one can overlook a minor detail like that. Even if I am going to lose, I would like to have the opportunity of least appearing on the playground. Then, in the Ellsworth Peters case the referee is in a field all by himself in that the referee's threshold finding which supports his recommendation is that the $200.00 that Drake was to pay on his wife's attorney's fees was to be placed in my trust account by terms of the divorce judgment. If that were the case and I applied the funds on Ellsworth Peters bill, I would be guilty of serious misconduct. But that was not the facts. If the foundation of the house is flawed, the entire house is flawed. When the referee made that erroneous finding he ignored my evidence which

established that I wrote Drake telling him that Peters told me that if the money was sent to me, it would be applied on his bill. That the statements sent to Peters reflected a decrease in the amount owed to me and that the decrease was a result of money that Drake was sending to me. Peters went for over a year without saying one word that he did not authorize me to do what was done. A dispute arises and a denial is forthcoming. In fifteen years of trial practice if the judge or referee makes a completely material erroneous finding of fact, the matter is referred back to allow for corrected findings so that the appellate court and the parties would know what the referee will find the facts to be. But not in this case where the appellate court corrects the flawed fact and says we will accept the recommendation. Then, there is the $18,532.80 assessment of costs which is the full bill for the referee and BAPR's attorney. Yet a great

portion of BAPR's attorney and the referee was spent on counts which were dismissed or lost. I consider myself a journeyman trial attorney who has served his apprenticeship. In all my years of trial practice in Wisconsin I have never seen any legal authorization wherein a litigant who loses half the counts charged can have all of his attorney's fees paid for. Plus the person paying does not get to see the charges or given an apportunity to question any of the costs. (pet. brief pg 60-61) I wish that when I lose a case that I could make the other side pay my fees.

CONCLUSION

The questions involved are important and do meet the criteria of Rule 17 so that my petition should be granted. and the bureaucratic malfunction needs to be corrected.

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